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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1657~~ 70-141

T. ELLIS HODGIN,
Petitioner

versus

THOMAS B. NOLAND, City Manager,
Martinsville, Va., individually
and in his official capacity,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on February 1, 1971.

Citations to Opinions Below

The Court of Appeals' per curiam opinion, affirming the action of the District Court, is not yet generally reported, but will be printed in the Appendix, *infra*, Page 1a. There is no opinion from the United States District Court for the Western District of Virginia in this matter.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 30, 1970. A timely petition for rehearing was filed with the Circuit Court, and on February 1, 1971, the Court of Appeals denied the rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

I. Whether a trial court is under a duty to make separate findings of fact and law in a case brought under 42 U. S. C §1983, where both legal and equitable relief was requested?

A. Whether in such a suit a jury's only function is to determine the personal liability of a public official sued for an alleged violation of a public employee's protected constitutional rights?

B. Whether the District Court erred in accepting the jury's verdict of no personal liability of the Defendant as being determinative of the issue of whether the Defendant was dismissed for constitutionally impermissible reasons.

II. Whether the procedural Due Process rights which inured to a public employee by virtue of his employment with a public agency is dependent upon the particular contract status that the employee has with the employing agency?

III. Whether the determination of the Court of Appeals that a public employee has no procedural Due Process rights in the absence of specific contractual or statutory provisions affording such protection, negates his right not to be dismissed for an assertion of a protected constitutional right?

Statement of the Case

In September, 1967, T. Ellis Hodgin was hired by the Defendant Thomas Noland, City Manager of Martinsville, to be the new librarian of Martinsville, Virginia. Neither Mr. Hodgin nor any other employee of the City of Martinsville had a written contract of employment. Salary scales were based upon formal resolutions of the City Council, which were administered by Mr. Noland. (Tr.-3) At the time of his hiring, the Martinsville Public Library was in bad shape. However, during the next almost two years, Mr. Hodgin worked hard to substantially upgrade the quality of the Martinsville Library. Indeed, in April of 1969, he was given a two-step raise to be effective as of July 1, 1969 (Tr.-14, 15).

Mr. Hodgin's difficulties with the Defendant arose not out of his work in the library, but out of his participation in a movement in Martinsville to rid the public schools of a religious education program which many persons in town considered to be in violation of the First Amendment of the Constitution of the United States. Mr. Hodgin's initial interest in the program resulted from a bad experience his daughter had with respect to the operation of that program. (Tr.-16)

At first, Mr. Hodgin's participation in the program was limited to meeting with members of the committee, signing his name on petitions to the school board, and similar activities without any kind of public involvement.

However, by April 1969, when negotiations proved fruitless, the anti-religious education group made the controversy public by appearing at school board meetings. The Plaintiff appeared at several meetings, but

only participated insofar as to give an account of the experience his daughter had with respect to the program. All negotiations with the school board failed to produce change in the program, and it was necessary to have recourse to the courts. (Tr.-17)

In July of 1969 a suit was filed in the federal District Court in Danville, Virginia, challenging the constitutionality of the program. The suit was a class action in which there were three named Plaintiffs, one of whom was T. Ellis Hodgin.[1]

On July 22, 1969, just four days after the filing of the suit, Defendant walked into the Plaintiff's office and asked him to resign. Defendant gave no reason for this request and refused to give Mr. Hodgin a reason when he asked for one. Mr. Hodgin refused to resign, but instead asked for some time to make up his mind. Mr. Noland did say that if Mr. Hodgin resigned, he could stay until September 1. (Tr.-18, 19) Mr. Noland returned on the morning of July 25, 1969, and again he asked for Mr. Hodgin's resignation. Mr. Hodgin refused, and he asked for an extension of the September 1 deadline so that he might be able to secure new employment without having to explain a forced summary dismissal. Mr. Noland told him he would come back on Monday for his answer. Again Mr. Noland refused to give a reason for requesting the resignation. (Tr.-21, 22)

Mr. Noland did not wait until Monday, but came back that afternoon and demanded Mr. Hodgin's resignation. In the scene that followed, which would be comical if it were not so serious, the Defendant literally attempted to physically detain the Plaintiff in his office until he signed his resignation, and Plaintiff tried all types of subterfuges in order to attempt to get a message to a friend so he could witness what was happening. Finally, without having given the Plaintiff a reason, the Defendant fired Mr. Hodgin summarily. (Tr.-26)

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[1] The Plaintiffs were successful in their action. The U. S. District Court for the Western District of Virginia held the program to be an establishment of religion in violation of the First and Fourteenth Amendments to the Constitution. *Vaughn* v. *Reed*, 313 F. Supp. 414 (1970).

On August 5, 1969, the Plaintiff filed a suit in the U. S. District Court for the Western District of Virginia at Danville, asking for reinstatement to his position as librarian plus personal damages from the Defendant for violation of his constitutional rights. Plaintiffs contention was that the sole reason for his dismissal was his participation in the religious education suit.

In their answer to Plaintiff's complaint, the School Board claimed the real reason for the firing was over-spending on his budget. This was the first time Plaintiff had ever been aware that this claim was being made against him, and this claim of over-spending was certainly not made during any of the discussions the Defendant had with Plaintiff during Defendant's attempts to get Plaintiff to resign.

After months of pre-trial preparation, the case came to trial in the U. S. District Court in Danville on March 24, 1970. The Plaintiff asked that the case be heard before a trial judge, except for questions of monetary damages, but the Defendant requested a jury trial. His request was granted, and a jury was convened.

The trial lasted for two full days, during which time some 25 witnesses were heard. In the course of the trial, the Plaintiff attempted to show that the firing could be for no other reason but his participation in the religious education suit as the so-called overspending of the budget was, in fact, the use of a technique called overencumbering the budget, which the Plaintiff had used the year before without any recriminations. (Tr. 8-13) The Plaintiff had expert witnesses testify that overencumbering the budget was a proper technique for building up libraries, and most useful especially when a library was small and needed a quick upgrading (Tr. 111-125).

The Defendant did not deny the fact at any time that the Plaintiff never had been given a reason for the firing at the time of the firing. (Tr. 177-179). The Defendant put on various witnesses, including a C. P. A., who made an audit of the library books, to attempt to show that the Plaintiff had overspent his budget. But by the testi-

mony of the Defendant's own witnesses, it was shown conclusively that at the time of the firing, even if the Plaintiff actually had overspent his budget, which we do not concede, the Defendant could not have had any figures to substantiate his claim of overspending the budget. A portion of the testimony involving the cross-examination of Mr. Robert Hogg, the C. P. A. who conducted the audit of the library's financial records, shows this to be so. (Tr. 227).

Q. When did you start this particular audit?

A. July 1st we made a cash accounting, but the first audit started July 19th.

Q. Started July 19th?

A. That's right.

Q. In approximately two or three days, how much work could you conceivably get done, so far as the library was concerned?

A. None.

Q. And would you say that a person who wanted to make a decision based on your audit on the 22nd of July, 1969, would have very little information to work with?

A. Yes, sir.

At the close of all evidence, the Plaintiff moved the Constitutional issue be decided by the judge separately from questions of personal liability, but this motion was overruled and the case submitted to the jury. After deliberating only 30 minutes, the jury returned a verdict for the Defendant. Plaintiff renewed his previous motion, and in addition requested that the Court grant him judgment notwithstanding the jury's verdict. This motion also was rejected.

Timely appeal was made to the United States Court of Appeals for the Fourth Circuit, and on December 8, 1970, a three-judge Federal Court of Appeals heard the appeal. On December 30, 1970, the Court of Appeals rendered a per curiam verdict affirming the action of the District Court.

Because your Petitioner believes that the Court of Appeals' decision was in error, with respect to its interpretation of the law concerning rights of public employees, timely petition for rehearing was filed with the U. S. Court of Appeals. On February 1, 1971, the Court of Appeals denied the Petitioner's motion for a rehearing and made the decision final.

When and How the Federal Questions Were Raised and Decided Below

The sole issues involved in this litigation have been issues of federal law. At the trial in the District Court, the Petitioner submitted a brief on the issues of federal Constitutional law involved in this case. Likewise, the Petitioner's request for instructions to the jury were primarily based upon interpretations of the law regarding constitutional rights of public employees.

It has always been Petitioner's contention that: 1.) the Petitioner was fired solely for his participation in the religious education suit, and 2.) The Petitioner was denied rights of procedural Due Process of law because the means by which he was dismissed. The District Court refused to give the jury an instruction regarding procedural Due Process of law. Likewise, it refused to make independent findings of fact as to the Petitioner's claim he was fired for the exercise of a protected constitutional right.

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals decided an important question of constitutional law which should be resolved by this Court. The Court

of Appeals' determination on the scope of rights of procedural due process of law of public employees with respect to their dismissals is in conflict with applicable rulings from this Court and the Fifth, Seventh, First and Second Circuits. Moreover, the Court of Appeals' ruling on the role of a jury in a suit brought under 42 USC §1983 seems to be in direct conflict with applicable decisions of this Court.

I

In a case brought under 42 U. S. C. §1983, in which both legal and equitable relief was requested, a trial court is under duty to make separate findings of fact and law and not accept the verdict of a jury as being determinative of the issues in the case.

This case raises important issues relating to the role a federal District Court judge plays in respect to a suit brought under 42 U. S. C. §1983. In this particular case, the Plaintiff brought his action, claiming that he was dismissed from his job as public librarian in Martinsville, Virginia, because — and solely because — he was a Plaintiff in a suit challenging a religious education practice of the public schools in Martinsville, Virginia.

In his Complaint, the Plaintiff requested equitable relief in the form of reinstatement and back pay, plus monetary damages against the City Manager of Martinsville, who was the person who fired the Plaintiff.

The Plaintiff requested a jury only as to monetary damages against the Defendant, but the Defendant requested a jury on all issues, and one was convened. After all testimony was taken, and after the jury was given instructions, the Plaintiff made a motion that the judge made independent findings of fact and law going to the question of whether the Plaintiff was entitled to equitable relief, irrespective of any verdict the jury might return. Judge Dalton denied the motion, stating (Tr. 282):

> The Court will leave the instructions stand as given to the jury substantially as set forth, the law in the case. I will permit them to stand. I think basically it is a factual question for the jury to determine here, and I will let them resolve the conflict.

After the jury returned a verdict for the Defendant, the Plaintiff again renewed his motion, but the motion was denied by the judge, both as to equitable relief and as a motion notwithstanding the verdict. On appeal, the Court of Appeals for the Fourth Circuit held that the factual issues in the case were issues for a jury to decide; and, since the instructions given to the jury included the charge that the jury would have to find for the Plaintiff if dismissal was in retaliation for exercise of protected constitutional rights, there was nothing improper in regard to the charge to the jury, and the jury's verdict should stand.

Both the District Court and Court of Appeals treated this case as a simple damage action, with the normal relegation of questions of fact to the jury and questions of law to the Court. However, the issue is much more complicated than that because the suit brought by Plaintiff was not a simple damage action, but was a suit brought for both equitable and legal relief under the terms of 42 U. S. C. §1983. That statute states:

> Every person who under the color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction therefor, the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit at equity, or other proper proceeding for redress.

As can be seen from the language of the statute itself, §1983 is a comprehensive remedy designed to afford one deprived of his constituional rights, by a person acting "under color of law" a large array of remedies, legal and

equitable. However, these remedies are not mutually exclusive, but rather are all inclusive in a single given action brought under the terms of the statute. *Monroe* v. *Pape*, 365 U. S. 167 (1961). 42 U. S. C. §1983 is the prime remedy for individuals' constitutional rights against incursions by state officials acting in their official capacities. And the keystone of the remedy is the unique position of the District judge. See Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970).

The particular value of the federal forum as an alternative to state forums as a means of redressing deprivation of constitutional rights falls from the unique understanding and experience District Court judges have in regard to ascertaining deprivations of protected constitutional rights by those acting under "color of law."

> Federal District Court judges, on the other hand, deal primarily with federal law falling from the Supreme Court and Circuit Courts of Appeal. The precedents which bind them and the superiors who guide them, all focus on federally derived rights and duties. They are, therefore, more likely to be well versed in the interrelationships of federal due process, equal protection, and Bill of Rights rulings in recent years. A Plaintiff whose federal claim is in any way novel may expect then a more educated analysis from federal courts than from state remedial tribunals — judicial or administrative.

Chevigny, *supra*, at 1357.

Because the federal judge is the keystone of the use of federal courts as a means to redress violations of constitutional rights of citizens by persons acting "under color of law." The prime remedy to be afforded a person always has been the injunction. It was only recently, in *Bell* v. *Hood*, 327 U. S. 678 (1946), and *Monroe* v. *Pape*, *supra*, that damages were permitted in suits brought under 42 U. S. C. §1983.

However, the scope of damages permitted by the *Monroe* v. *Pape* rule was limited to damages against the individual officer of the state who deprived the Plaintiff or Plaintiffs of their constitutional right, and this officer could only be sued in his personal and not in his official capacity. The Court, in *Monroe* v. *Pape*, made it clear that governmental bodies could not be sued for damages under 42 U. S. C. §1983.

But the fact that governmental bodies could not be sued for damages, or that individual officers of Government could only be sued in their personal capacities, does not mean that no remedy existed against governmental bodies or their officers. Quite the contrary, equitably type actions against governmental bodies, in their institutional form, or against individual officers of Government in their official capacities, remain the prime means of relief under 42 U. S. C. §1983. And, since equitable relief is still the prime vehicle for redress of deprivation of constitutional rights under 42 U. S. C. §1983, it would obviously follow from that, that the federal judge still stands as the keystone of the entire system for redressing deprivations of constitutional rights. *Monroe* v. *Pape*, *supra*.

It is in view of the singularly important role the federal judge plays in suits brought under 42 U. S. C. §1983 that a searching look must be given to what role juries should be allowed to play in such suits.

The jury, as a vehicle for preservation of individual rights, came into prominent use in the United States during the Colonial times, when unpopular Colonial governors would be taking actions against individual citizens, and such actions were in direct conflict with the desires of the majority of the citizens in the Colony. An example is the famous trial of John Peter Zanger in New York for printing "seditious" comments against the Colonial governor. However, in the *Zanger* trial, which has provided the model for the potential of a jury to redress arbitrary action by the Government, the real role the jury played in that case, and the reason it became so enshrined,

was that it acted in a way contrary to existing law; it imposed the majority view of the citizens against the minority views of the Government.

However, one must, in view of the historical role juries have played, seriously question their usefulness in cases involving unpopular assertions of First Amendment rights, where the general majority view supports the actions of the Government official, rather than the action of the Plaintiff. See Monahan, *First Amendment Due Process*, 83 HARV. L. REV. 518, 528, 529 (1970).

This Court has come to recognize that the role of the jury may need to be an anti-civil libertarian one. In *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), this Court was faced with a situation where a jury was used to limit free expression, albeit in a libel suit rather than in a §1983 action. Nevertheless, this Court showed it had very strong reservations about the role of juries with respect to First Amendment rights.

In a concurring opinion, Mr. Justice Goldberg, joined by Mr. Justice Douglas, stated:

> That argument, however, is not responsive to the real issue presented by this case, which is whether freedom of speech, which all agree is constitutionally protected, can be effectively safeguarded by a rule allowing imposition of liability upon the jury's evaluation of the speaker's state of mind. If individual citizens may be held liable for damages for strong words, which a jury finds false and maliciously motivated, there can be no doubt that public debate and advocacy will be constrained. And if newspapers publishing advertisements dealing with public issues thereby risk liability, there can also be no doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished.

376 U. S. at 300.

No claim is being made in this case that the trial judge acted in any way unfairly toward the Plaintiff. The trial itself was a model of fairness which well could be emulated by other courts in other places in the country. However, what your Petitioner is saying is that both the trial judge and the Court of Appeals erred when they thought this case could be handled according to the traditional strict dichotomy which states that questions of law should be decided by the judge, and questions of fact should be decided by the jury. The end result of this was to, in effect, deny the Plaintiff the right of access to a federal court for purposes of redressing a deprivation of his constitutional rights by a state official.

Since federal courts exist to provide an alternate remedy under §1983 to state tribunals, it would be destroying the basic premise on which §1983 is founded to make the jury the prime enforcer of the statute.

It was, thus, incumbent upon the trial court to make an independent finding of fact as to the request for equitable relief. This finding of fact must be made even if the trial court allows a jury verdict, based on diametrically opposite findings of fact, to stand on the issue of personal liability. We believe the trial court was in error when it refused to grant the Plaintiff's motion for a judgment notwithstanding the verdict as to the personal damage claim, but that is a separate issue from that in question here.

The Plaintiff went into federal court precisely because he wanted his particular case heard by a federal judge who would be independent of the local pressures and prejudices that made relief in local state courts impossible. The one thing Plaintiff did not want was to have his case decided by a so-called "jury of peers" which could not, by any definition, be a jury of peers. The basic claim of the Plaintiff was that he was being fired for engaging in activities which, though constitutionally protected, were nevertheless highly unpopular in the general community. The forcing of him to have his claim decided by representatives of the general community, among whom

he was so unpopular, would, in effect, be denying him a federal forum.

In *New York Times* v. *Sullivan*, *supra*, and just recently reaffirmed in *Time, Inc.* v. *Pape*, ____ U. S. ____ (1971), this Court recognized that the use of a jury in a libel action brought by a public official against an institution of public communication could have an extremely chilling effect on the assertion of protected constitutional rights, and, more particularly, criticism of public officials. The issue this Court has not yet decided is whether a jury also can be used as a means of insulating public officials from legal action brought against them by persons whom they have injured during the course of their official duties as a means of retaliation for the assertion of a protected constitutional right. This case raises such an issue, and it presents this Court with an opportunity to more clearly delineate the nature of the role the federal courts must play in the protection of constitutional rights of citizens.

II

The Circuit Court erred in determining that the petitioner was not entitled to be afforded rights of procedural Due Process prior to his being fired since he did not have an employment contract which afforded such rights prior to termination.

The lack of procedural Due Process substantially undermined his right not to be fired for the exercise of a protected constitutional right which the Circuit Court agreed was a limitation on the right of a public employer to dismiss its employees.

The Plaintiff in his argument to the Fourth Circuit asked that court to reverse the decision of the trial court on the grounds that he was dismissed from his job in violation of his rights of procedural Due Process of law, guaranteed under the Fourteenth Amendment to the Constitution. The Circuit Court rejected that argument, holding:

> We conclude that the trial judge was correct in instructing that the Defendants were not required to give such formal notice or to provide a hearing. As city librarian, Mr. Hodgin held his position at the will and pleasure of the City. There was no contractual or other arrangement limiting the right of termination. Accordingly he was subject to summary discharge with or without cause, so long as it was not in retribution for an exercise by him of some constitutionally protected rights.[1]

This exposition of the law puts the Fourth Circuit in conflict with decisions of this Court which hold that the determination of when a public employee is to be given minimum rights of procedural Due Process before dismissal is based upon a careful balancing of the employee's right to minumum procedural Due Process with the agency's right and need for summary adjudication in a given situation,[2] and puts the Fourth Circuit in conflict with the holdings of other circuits to the effect that where an ostensible claim of dismissal for impermissible reasons is made, it is necessary to furnish the employee minimum levels of procedural Due Process lest the lack of procedural Due Process be used as a means to perpetuate a constitutionally impermissible dismissal.[3]

Since the case of *Cafeteria Workers Union* v. *McElroy*, 367 U. S. 886 (1961), was decided, this Court has not decided any cases raising the issue of requirements of procedural Due Process for public employees before they can be dismissed. However, the lower courts have been flooded with cases raising these issues, and great splits have developed among the circuits, especially in

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[1] By minimal procedural Due Process we are referring to the right of a public employee to be furnished the reasons he is being dismissed, plus being afforded some opportunity to reply to those allegations, be it by the use of affidavit or through a formal hearing. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970).

[2] *Cafeteria Workers Union* v. *McElroy*, 367 U. S. 886 (1961); *Goldberg* v. *Kelly*, *supra*.

[3] *Pred* v. *Board of Public Instruction*, 415 F. 2d 851 (5th Cir. 1969); *McLaughlin* v. *Tilendis*, 398 F. 2d 287 (7th Cir. 1968); *Bomar* v. *Keyes*, 162 F. 2d 136 (2nd Cir.), *cert. denied*, 332 U. S. 825 (1947); *Drown* v. *Portsmouth School District*, —— F. 2d —— (1970), 39 U. S. L. W. 2371 (1971).

cases where it is claimed that dismissal was for constitutionally improper reasons.[4] Because of this situation the time is right for this Court to reevaluate *Cafeteria Workers* in light of new developments in the law and to issue guidelines for lower federal courts as to matters of procedural Due Process of public employees.

The right to be afforded procedural Due Process is based upon an inherent duty of the Government to be fair when taking an adverse action against a citizen. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 161-163 (Frankfurter, J., *concurring opinion*, 1950).

This requirement to be fair is not based upon the existence of any additional constitutional issue. The only way the Government can avoid furnishing minimal requirements of Due Process is to justify the need for summary adjudication in a given case as per the balancing test requirement of *Cafeteria Workers*. However, *Cafeteria Workers* developed in the context of a summary dismissal of a worker from a military base, upon grounds of national security; a fact situation which is not found in this case, or in most cases of this type. In that case, this Court balanced the need for a public employee to be afforded procedural Due Process before dismissal against the needs of a military commander to take action against a citizen on a summary basis. Finding the national security interest to be paramount, it allowed the dismissal.

However, *Cafeteria Workers* should not be read as a broad license to allow the dismissal of public employees without affording them procedural Due Process. At the very least, a balancing test presupposes the existence of a right to procedural Due Process with the countervailing interest of the Government weighed against such interest. The Fourth Circuit views one reason for allowing the dismissal the fact that there was no contractual statutory right of the Plaintiff to be afforded certain types of procedural Due Process. *Cafeteria Workers* does not state that contract status or lack of such is grounds for allowing summary dismissal. The lack of contract status could be

[4]See cases cited on Page 20, *infra*.

a factor in the favor of the Government in terms of the balance, but it is only a factor.

The employee in *Cafeteria Workers* was in a non-critical job and could easily find employment in a private sector job.

One factor in the balancing test which would go toward the employee would be the nature of his particular interest in the job, irrespective of the contract status under which he holds that job. Thus, unlike the short-order cook in *Cafeteria Workers*, a teacher or a librarian could have his professional career ruined by an unexplained dismissal with subtle hints and innuendos of misconduct on the part of the employee, and because of such severe consequences of dismissal such an employee has certainly the stronger expectation of being afforded procedural Due Process before dismissal than would other employees. See *Drown* v. *Portsmouth School District*, *supra*.

An approach on this line was very recently taken by the First Circuit in a case involving a non-retention of a public school teacher who had put in four years of good service. *Drown* v. *Portsmouth School District*, *supra*.

In this case, no reasons for the non-retention were given. Using the balancing test of *Cafeteria Workers*, the First Circuit weighed the interests of the school teacher in knowing the reasons for dismissal, especially taking into account two factors: first, if there was misconduct, the need for the professional to know what was considered wrong with the performance; and, second, if the cause of dismissal was a narrow-minded educational policy on the part of a local school board, this would enable the teacher to show that it was the board's fault, not her own, even if the board had a legal right to dismiss the employee. Compared to these needs of the employee, the Court found that the requirements of the board for having summary dismissal and the hardship that would ensue to the board for furnishing the same was so slight, that the employee was entitled to be given the reasons for her

being dismissed and an opportunity to make a reply for the record.

A.

Another and even more important reason to require minimal procedural Due Process for the dismissal of public employees is that without such requirements, a public employer easily can circumvent the requirements held by all courts that a public employee cannot be fired for the exercise of a constitutionally protected right, a right which the Circuit Court herein in *Hodgin* clearly stated that public employees have. *Hodgin* v. *Noland*, ____ F. 2d ____ (1970); *Pred* v. *Board of Public*, *supra*; *Ferguson* v. *Thomas*, 430 F. 2d 852 (5th Cir. 1970); *Sindermann* v. *Perry*, 430 F. 2d 939 (1970) appeal docketed 11/8/70; *Harkless* v. *Sweeny Independent School District*, 427 F. 2d 319 (5th Cir. 1970), *cert. denied*, 1/11/71.

The ironic part of the Circuit Court's ruling here is that in deciding that a public employee does not have any rights to procedural Due Process, prior to termination, the Circuit Court did, in effect, destroy the substantive right of public employees not to be fired "in retribution for an exercise by him of some constitutionally protected right."

Substantive and procedural rights of public employees are not separate and distinct, but vitally interrelated. What good is it to say that a public employee cannot be fired for asserting constitutional rights if it also is said, as it was by the Circuit Court, that he can be fired for no cause? All this means is that public employees can be fired for asserting constitutional rights if the employer does not tell them why they are being fired. Only if a public employer is foolish enough to list as the reason for firing a public employee the employee's assertion of a constitutionally protected right, can the employer be held judicially liable under the theory of the Fourth Circuit in this case.

If this rule is followed to its logical conclusion, it seems that, except where public employees are protected

by civil service regulations, or have specific contractual regulations affording them procedural Due Process, public employees in general are stripped of their constitutional protection and can be fired for any reason, including factors which have nothing to do with one's job and are constitutionally protected. As William Van Alstyne has stated:

> Without question, therefore, the effective protection of constitutional rights of teachers and professors [any public employee] may critically depend upon the availability of pretermination procedural Due Process.

Van Alstyne, *Constitutional Rights of Teachers and Professors*, Volumn 1970 DUKE L. J. 841.

The balance between the interest of employees and the interest of the public employer is one extremely strongly on the side of the employees, the interest in not being dismissed for constitutionally impermissible reasons. The balance to be carefully preserved, employees must be furnished procedural Due Process before dismissal unless the remedy allowed to them of suing in federal court for a constitutionally impermissible dismissal be completely negated. The experience of the Petitioner in this case, and in many other cases, shows that where a public employee was dismissed without being afforded reasons for the dismissal at the time of the dismissal, he faces an almost impossible task of proving an impermissible dismissal in Court. Not only does he have to prove his case on the basis of purely coincidental evidence, but, more importantly, the time lag between dismissal and the bringing of the legal action often gives the employing agency time to make a case based on alleged improprieties of the employee when no such case existed at the time of the dismissal. The rule of the Fourth Circuit in this case will go a long way in undercutting the guarantees of constitutional rights of public employees which were formulated by this Court in *Pickering* v. *Board of Education*, 391 U. S. 563 (1968).

The case shows that it is not idle speculation that public employers have used the no-cause firing as a means of avoiding the rule of *Pickering*. Only if this Court imposes some kind of procedural Due Process on public employers will this evasion be prevented. This case presents an opportunity to set down these guidelines, and the Petitioner urges this Court to hear this case for that reason.

CONCLUSION

For the reasons outlined above the writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX

United States Court of Appeals for the Fourth Circuit

No. 14,641

T. ELLIS HODGIN,

Appellant,

versus

THOMAS B. NOLAND, *City Manager*, Martinsville, Va., individually and in his official capacity,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT DANVILLE.
TED DALTON, *District Judge.*

(Argued, December 9, 1970. Decided December 30, 1970.)

Before:

HAYNSWORTH, *Chief Judge*, and
BOREMAN and BRYAN, *Circuit Judges.*

ROBERT P. DWOSKIN *for Appellant*, and
JACKSON L. KISER (YOUNG, KISER, FRITH & HASKINS, and IRVIN W. CUBINE ON BRIEF) *for Appellee.*

PER CURIAM:

The appellant brought this suit against the City Manager of Martinsville, Virginia, and others in authority, claiming that he was illegally discharged from his position as city librarian because of his participation in constitutionally protected activity. In the fall of 1968 Mr. Hodgin became an active participant in a concerted effort to achieve a change in the religious education program conducted in the local schools. This culminated in a lawsuit filed on July 18, 1969 challenging that educational program. The appellant was discharged within a week of the filing. He claims that the defendant's action was motivated by animosity resulting from his part in the lawsuit. The defendants denied any such purpose, asserting instead that the appellant had used an improper and unauthorized accounting method, resulting in purchases in excess of his budgetary limits and his concealment of invoices, which facts had come to the defendants' attention shortly after the first of July.

The disputed question of fact was submitted to the jury under proper instructions. It concluded that the reason for discharging the appellant was not to punish or retaliate against him for taking an unpopular stand. The trial judge properly instructed the jury that any such intention on the part of the defendants would have been impermissible and would require a judgment for the appellant.

There was ample evidence to support the jury's conclusion that the discharge was occasioned solely by the violation of the rules governing his purchases.

The appellant also claims that he was denied procedural due process in the discharge. He complains that he was afforded neither notice of the cause for his discharge nor a hearing to determine its appropriateness. We conclude that the trial judge was correct in instructing that the defendants were not required to give such a formal notice or to provide a hearing. As city librarian, Mr. Hodgin held his position at the will and pleasure of

the city. There was no contractual or other arrangement limiting the right of termination. Accordingly, he was subject to summary discharge with or without cause, so long as it was not in retribution for an exercise by him of some constitutionally protected right. *Jones* v. *Hopper*, 10 Cir., 410 F. 2d 1323; *Parker* v. *Board of Education*, D.Md., 237 F. Supp. 222; aff. 4 Cir. 348 F. 2d 464.

Affirmed.

IN THE

United States Court of Appeals for the Fourth Circuit

No. 14,641

T. ELLIS HODGIN,
Appellant,

versus

THOMAS B. NOLAND, *City Manager,*
Martinsville, Va., individually
and in his official capacity,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT DANVILLE.

ORDER

Upon consideration of the petition for rehearing in the above entitled case by the panel, and with their concurrence,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, denied.

For the Court:

Chief Judge, Fourth Circuit

Filed
February 1, 1971
SAMUEL W. PHILLIPS
Clerk

FILE COPY

MAY 25 1971

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ~~1-97~~ 1070-14

T. ELLIS HODGIN, *Petitioner,*

v.

THOMAS B. NOLAND, City Manager, Martinsville, Va., individually and in his official capacity, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

T. ELLIS HODGIN, *Petitioner,*

v.

THOMAS B. NOLAND, City Manager, Martinsville, Va., individually and in his official capacity, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTRODUCTION

T. Ellis Hodgin, Petitioner, was the Plaintiff in the Trial Court, and hereinafter will either be referred to as Hodgin or Plaintiff. Thomas Noland, Respondent, and City Manager for the city of Martinsville, Virginia, was Defendant in the Trial Court and hereinafter will be referred to as Defendant or Noland. All references to the Appendix will be designated (App.). All references to Exhibits will be designated (Ex.).

STATEMENT OF CASE

The Plaintiff's Complaint and the Defendant's response in this case joined issue on the reason for the discharge of the Plaintiff Hodgin by the Defendant Noland. The Plaintiff requested a jury trial on the question of damages. The Defendant made no request for a jury trial. The Court determined that inasmuch as there was a disputed question of fact as to the reason for and the manner of discharging Hodgin that he would submit the case to the jury to determine the disputed questions of fact. The Court's decision was announced to the parties and neither the Plaintiff nor the Defendant interposed any objection thereto.

On March 24, 1970, a jury was duly impaneled to hear the case. At the first recess one of the jurors received word of the unexpected death of her father and the Court excused the juror from further service. By agreement of counsel and the Court, the trial proceeded with eleven (11) jurors. At the close of the Plaintiff's evidence, both the Plaintiff and the Defendant moved for directed verdicts and summary judgment, and both motions were denied. The defense introduced its evidence and rested, after which the Court gave its charge to the jury in accordance with the charge that the Court had previously discussed with counsel. The jury retired to deliberate, and, at that time, both Plaintiff and Defendant renewed their motions, which were denied by the Court.

The jury returned its general verdict in favor of the Defendant, and the Plaintiff moved the Court for judgment, notwithstanding the verdict. The Court overruled the motion and entered judgment in the Defendant's favor in accordance with the verdict of the jury.

The statements by the Plaintiff on page 5 of his Petition to the effect that he limited his request to a jury trial to that of damages and on page 6 that he moved the Court for a separate decision as to liability and damages are wholly incorrect and are not borne out by the Record. Moreover, the statement on page 7 that the Court refused to make independent findings is incorrect and not borne out by the Record. A search of the Record will reveal that at no time did the Plaintiff make a request for independent findings of fact.

On appeal the decision of the Trial Court was affirmed and subsequently the Plaintiff petitioned this Court for a writ of certiorari here being considered.

STATEMENT OF FACTS

T. Ellis Hodgin was employed by the City of Martinsville in September of 1967 as librarian for the Martinsville Public Library. The job had no tenure, but was held at the pleasure of the City Manager, as are all jobs under his jurisdiction (App. 102-4; 173; Ex. D-2, D-18).

On July 25, 1969, Hodgin was discharged from his job by Thomas B. Noland, City Manager (Ex. D-27; App. 116, 157-8). Earlier, on July 22, 1969. Noland had asked Hodgin for his resignation, effective September 1, 1969 (App. 114-5). The events that precipitated Noland's action came to his attention in the early part of the month of July, 1969 (App. 111,168).

Around the second or third of July, the Finance Director for the City of Martinsville, Mr. Holladay Yeaman, apprised Noland that he had received a very large number of invoices from the library wherein the

librarian, Mr. Hodgin, had obligated the City to sums of money which heretofore had been unknown to the Director of Finance and that the library was going to substantially exceed its appropriations (App. 111, 168). Several days later, on toward the middle of July, Noland approached Hodgin and asked for an explanation of his action in having accumulated so many unpaid invoices (App. 111-2), around 100 in number, some of which were as much as 6 to 8 months old (see Exhibit D-3 & D-17). At this time, Hodgin's explanation was that he did this in order to qualify for Federal funds (App. 112). Noland accepted this explanation for the time being (App. 112). However, several days later it occurred to him that he had read a contrary bit of information in the past (App. 112). His recollection was that in order to quality for Federal funds, all purchases had to be ordered, received, and paid for by the local library within the same fiscal year (App. 113, 159). Upon further investigation he found his recollection to be accurate and Hodgin's explanation to be inaccurate (App. 159-160). He then determined that Hodgin had intentionally circumvented the City's budgetary controls and on July 22 he asked for Hodgin's resignation (App. 113-4).

The evidence showed that the City of Martinsville had a budgetary control practice under which moneys were appropriated for the various City departments for the specific purpose that the department had requested them (App. 34-5; 161-3). In this instance, the library received an appropriation which was broken down into various categories, the most pertinent here being the books and supplies categories (see Exhibit D-22), which Hodgin overspent by some 46 per cent (Ex. D-25). To maintain a budgetary control, the procedure was that the librarian would order the necessary books and materials

for the library and when he received the invoice from the vendor, he would check to make sure the order had been filled properly and then prepare a City voucher certifying the vendor's invoice was proper for payment against the account indicated on the voucher. The voucher was sent to the Director of Finance, who paid the bill and charged it against the appropriate account (App. 34-5, 161-3). Hodgin was kept informed of the balance in the various accounts by monthly statements sent from the Director of Finance to him. Hodgin had been specifically told he would not be permitted to exceed his budget or to spend from one account for another purpose without prior authorization (Ex. D-4, D-5, D-6; App. 39-42).

To circumvent these budgetary controls Hodgin clandestinely withheld a large number of invoices (App. 39-41, 43, 185; Ex. D-3, D-17). By not submitting them for payment, neither the Director of Finance nor the City Manager had any way of knowing what amounts of money had been spent (App. 165). Hodgin told neither Noland nor the Director of Finance of his activities (App. 43, 124).

This was the reason that Noland asked for Hodgin's resignation. He emphatically denied the allegations of Hodgin that he asked for his resignation because of his participation in a suit which sought to enjoin the City of Martinsville School Board and others from conducting religious education classes (App. 113-4; 117-9; 146). Noland's denial of this allegation was further buttressed by two witnesses, Henry Gilbert, a newscaster for a local radio station (App. 188), and Donald Richardson, a City employee of the City of Martinsville (App. 189). Both witnesses testified that they had made very vigorous complaints to Noland about Hodgin's activities at a School

Board meeting and that Noland had completely defended Hodgin in this activity and had told them that it was Hodgin's right as a citizen to engage in such activity and that he could not be and would not be subject to any disciplinary action because of his engaging in this activity (App. 188-9). Moreover, Noland's helpful attitude was conceded by the testimony of Hodgin himself, who said that Noland had always treated him professionally and that such action was out of character with Noland's prior conduct. Hodgin wrote Noland a letter of appreciation for his help (Ex. D-1; App. 28).

The only evidence offered by Hodgin to connect his discharge with the suit against the School Board was the coincidence of time. Hodgin admitted that Noland never threatened him with discharge; but this was something he surmised (App. 26-8). The School Board suit was filed on July 18 and Hodgin was requested to resign on July 22. But it must be kept in mind that the request for resignation also coincided with the discovery of Hodgin's activities in circumventing the budgetary safeguards which had been established by the City.

Hodgin testified that he did not know why he was being fired (App. 17). This was contrary to Noland's testimony, who said that Hodgin well knew why he was being discharged (App. 112-4, 141, 151), but that he, Noland, did not go into it with him on July 22 and 25 because of Hodgin's rather belligerent attitude and because he anticipated a law suit by Hodgin (App. 147-8, 157-8). Obviously, the jury chose to accept Noland's corroborated testimony over Hodgin's uncorroborated testimony, which was seriously impeached by no less than seven (7) very material inconsistent statements. The seven were: (1) Hodgin stated that he made prior arrange-

ments with Mr. Copps, of Baker and Taylor, for credit (App. 46-7). Copps denied this (App. 187); (2) Hodgin stated that he had not been previously discharged from a job in a library at High Point, North Carolina (App. 62-3). Mr. Austin, librarian of the High Point Public Library, testified that he had discharged Hodgin (App. 159); (3) Hodgin testified that he restricted library services to Dr. Bing because of the complaint of Mrs. Flora, an employee of the library, that Dr. Bing was rude (App. 65). Mrs. Flora denied this (App. 187); (4) Hodgin testified that Noland had not come to him at the end of the fiscal year and discussed with him the excessive number of invoices which had been presented at the end of the fiscal year (App. 9). Noland testified that he had had such a discussion with Hodgin in the first part of July 1969 (App. 111-2); (5) Hodgin's admission that he certified vouchers for payment when he knew there were no funds available for payment (App. 37, Ex. D-3); (6) Hodgin testified he had not refused a library service to Dr. Bing (App. 57). Dr. Bing and Mrs. Nickelston testified he had (App. 186; T. 244); and (7) At trial Hodgin testified he was hired on a year to year basis, but in discovery deposition he said he felt he held his position at the pleasure of City Council (App. 52-53).

STATEMENT OF ISSUES

I. The Trial Judge submitted all issues of fact to a jury for determination without objection by either Plaintiff or Defendant and both parties were bound thereby.

II. Plaintiff was an employee without tenure, and served at the will and pleasure of the Defendant, and his manner of discharge in no way violated due process of law.

ARGUMENT

I

THE TRIAL JUDGE SUBMITTED ALL ISSUES OF FACT TO A JURY FOR DETERMINATION WITHOUT OBJECTION BY EITHER PLAINTIFF OR DEFENDANT AND BOTH PARTIES WERE BOUND THEREBY.

We agree with Plaintiff that 42 USCA, Sec. 1983 brings under its mantle the entire panoply of legal and equitable remedies known to our jurisprudence. This section does not, however, seek to change the nature of those remedies or the procedure by which they are attained. Legal remedies remain legal remedies and equitable remedies remain equitable remedies.

Part of the relief asked for by the Plaintiff in this action was One Million Dollars ($1,000,000.00) in damages. A pure common law action in which a trial by jury is a matter of right, and this is true even though the equitable relief sought may be the predominating remedy in the law suit. *Dairy Queen, Inc.* v. *Wood,* 369 U. S. 469, 82 S. Ct. 894 (1962); *Simmons* v. *Avisco, Local* 713, *Textile Workers Union,* 350 F. 2d 1012 (4th Cir. 1965); *Madison* v. *Wood,* 410 F. 2d 564 (6th Cir. 1969).

Federal Rules of Civil Procedure, 38 and 39, make it very clear that the issues to be submitted to the jury are under the control of the Court. If the Plaintiff, in fact, had any objection to the Court's submitting the issues to the jury, he did not register such objection, even though the opportunity presented itself many times. At one stage of the trial, when the Court advised counsel it was necessary to excuse one of the jurors, the Defendant suggested

that the Court might hear the case without a jury. The Plaintiff made no comment at this time but was completely silent (App. 51). Nowhere in the record does it ever appear that the Plaintiff objected to a jury trial on all issues, nor did he attempt to limit the jury's inquiry into the facts by submitting a request for a special verdict or interrogatories to the jury under Rule 49 of the *Federal Rules of Civil Procedure*. The Plaintiff cannot be heard to complain on appeal when he did not raise this issue in the trial court. *Simmons* v. *Avisco*, 350 F. 2d 1012 (4th Cir. 1965).

The Trial Court's power to step in and disapprove the jury's findings of fact was limited by the same principles that limit this Court in disapproving the finding of fact, i.e., it may be done only where there is no evidence to support the jury's finding. There was very ample evidence to support the jury's verdict, and the Trial Court had no alternative but to sustain the verdict. *Lavender* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740 (1946).

II

Plaintiff Was An Employee Without Tenure, And Served At The Will And Pleasure Of The Defendant, And The Manner Of His Discharge In No Way Violated Due Process Of Law.

In part II of his argument, the Plaintiff urges that the terms under which he was employed, be they statutory or contractual, have no bearing on what he has designated "procedural due process." No statement could miss the mark further, for the very nature of due process is to first balance the needs and harms which flow from a

given action and the very cases cited by the Plaintiff support this. Thus, where the employee's position is very tenuous and subject to the will of his superior, then his "procedural rights" of due process are all but nonexistent. *Nelson* v. *County of Los Angeles,* 362 U.S. 1, 80 S. Ct. 527 (1960); *Vitarelli* v. *Seaton,* 359 U. S. 535; 79 S. Ct. 968 (1959); *Parker* v. *Board of Education of Prince George's County, Md.,* 237 F. Supp. 222; aff. (D-Md. 1965); 348 F. 2d 464 (4th Cir. 1965) cert. denied, 382 U. S. 1030, 86 S. Ct. 653 (1966); *Jones* v. *Hopper,* 410 F. 2d 1323 (10th Cir. 1969), cert. denied, _____ U. S. _____, 90 S. Ct. 1111 (1970); *Freeman* v. *Gould Spec. School Dist. of Lincoln Co., Ark.,* 405 F. 2d 1153 (8th Cir. 1969), cert. denied, 396 U. S. 843, 90 S. Ct. 61 (1969) See also *Cafeteria & Restaurant Workers Union, Local* 473 v. *McElroy,* 367 U. S. 886, 81 S. Ct. 1743 (1961).

In the case at bar it is quite evident that the Plaintiff was an employee at the will and pleasure of the City Manager and subject to discharge without cause. The 1950 *Code of Virginia,* 1964 *Replacement Volume,* at Section 15.1-930, in dealing with the appointment and removal of necessary employees by a city manager, states as follows:

> ". . . such other officers and employees as the council of such city or town shall determine are necessary . . . shall be appointed and may be removed by the city or town manager, who shall report each appointment or removal to the council . . . following any such appointment or removal."

The *City Charter for the City of Martinsville, Virginia,* Chapter 5, Section 1, provides:

> "The administrative and executive powers of the city, including the powers of appointment of officers and employees, are vested in an official to be known as the city manager . . ."

and Section 2 of the same chapter provides that the city manager shall:

> ". . . see that such city officers and employees as the council shall determine are necessary for the proper administration of the city be appointed and may be removed by the city manager . . ."

In the Trial Court the Plaintiff claimed that his status as an employee at will was altered by a contract that he had made for a definite term. But the only item he was able to point to in an attempt to substantiate this was his per annum pay rate (App. 30-2, 53). Plaintiff, however, has conceded that no contract for a term of office existed (see page 3 of Petition and pages 44 and 53 of Appellant's Brief in Fourth Circuit).

The rule covering the term or tenure of a public employee is stated in 43 *Am. Jur.,* Public Officers, Sections 183 and 184, wherein it is said:

> When the term or tenure of a public officer is not fixed by law, and the removal is not governed by constitutional or statutory provisions, the general rule is that the power of removal is incident to the power to appoint. Inasmuch as the tenure has not been declared by law, the office is held during the pleasure of the authority making the appointment, and no formal charges or hearings are required in the absence of some statute on the subject. The foregoing rule applies although the appointing power attempts to fix a definite term." (p. 31)

> "The general rule as to offices created to be filled by appointments is that if the legislature does not designate the term of the office, the appointee will hold only during the pleasure of the appointing power and may be removed at pleasure, at any time without notice or hearing." (p.32)

These principles have been consistently recognized by the federal courts. In *Cafeteria & Restaurant Workers Union, Local* 473 v. *McElroy,* 367 U. S. 886, 81 S. Ct. 1743 (1961), it was said:

> "It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." 367 U. S. p. 896, 81 S. Ct. p. 1749.

Accord: *Vitarelli* v. *Seaton,* 359 U. S. 535, 79 S. Ct. 968 (1959). It appears, then, that inasmuch as there was no statutory enactment giving Hodgin tenure or job security of any nature that Noland had the authority to discharge him at will.

The next question to logically rise in the order of things is: In the exercise of his power, what procedural requirements does the concept of due process impose upon Noland? Turning again to *American Jurisprudence,* this statement is found under the heading of *Hearing When Removable at Will*:

> "No formal charges or hearings are, as a rule, required when a public officer holds only at the pleasure of his superiors, as where the provisions for appointment prescribe no definite term and does not require that the removal be for cause, or where the removal be for cause, or where the removal depends on the exercise of

personal judgment on the question of whether cause for removal exists. It has been seen that the holder of a public office without a definite term holds at the pleasure of the appointing power. So, also, a grant in general terms of the power to remove public officers carries with it the right to remove at any time or in any manner deemed best, with or without notice and hearing." 43 *Am. Jur.*, Public Officers, (Sec. 213, p. 52)

Parker v. *Board of Education of Prince George's County, Md.*, 237 F. Supp. 222 (D. Md. 1965); aff. 348 F. 2d 464 (4th Cir. 1965); cert. denied 382 U. S. 1030, 86 S. Ct. 653 (1966), is virtually on all fours with the case at bar. In the district court opinion statement of facts, it is found that the plaintiff Parker was a high school teacher, who had taught in the Maryland School System for a period of two years. He had not attained tenure and under his contract was subject to being discharged upon the school board's giving notice to him that his contract would not be renewed. During his second year of teaching, he was notified by the school board that his contract would not be renewed. After being so advised the plaintiff requested from the board a statement of charges and a hearing, which were not furnished by the board. He then filed suit alleging that his constitutional rights had been violated in that: (1) His contract was not being renewed because he was using a book in his class entitled *Brave New World,* which the administration found objectionable; and (2) That because he had not been told why his contract was not being renewed, his right of procedural due process was being violated. Chief Judge Thomsen heard the case on a motion to dismiss the Complaint and, in denying the relief prayed for, stated:

"Generally, in the absence of statute or unreasonable discrimination, a public employee

> may be summarily discharged from government service without the necessity of a hearing, and such action does not amount to a denial of due process." (p. 228)

The Fourth Circuit Court of Appeals approved the action of Judge Thomsen and this Court approved the action of the Fourth Circuit Court of Appeals by denying certiorari.

Another case which is very close factually and which deals with the same legal problems presented in the case at bar and presented in *Parker* is found in the *en banc* decision of the Tenth Circuit in *Jones* v. *Hopper,* 410 F. 2d 1323 (10th Cir. 1969) cert. denied, ____ U. S. ____, 90 S. Ct. 1111 (1970). Here, as in *Parker,* a teacher in his second year was notified by the Regents that he would not be rehired. He charged that the reasons for failure to rehire him were because he had objected to the college's action in not hiring an Oriental professor, had criticized the English Department's use of a textbook, had founded an independent faculty-student newspaper, had supported a student who refused to register for the draft, and had criticized the Viet Nam War, all of which he claimed to be protected by the First Amendment. The letter from the college notifying the plaintiff that he would not be rehired for another term gave no reason for the action of the Board of Regents. The case was heard on the pleadings. In analyzing the problem at hand, Chief Judge Murrah, speaking for the majority, posed this question:

> "What guaranteed right, privilege or immunity was denied (plaintiff) which is protected under the Constitution and laws?" (p. 1327)

After determining there was no breach of contract on the part of the college, he said:

> "It is admitted he did not have a tenure privilege either by Colorado law or contract. 'Among the most fundamental rules of the law of master and servant is that which recognizes that, absent and applicable statutory or contractual provision to the contrary, an employer enjoys an absolute power of dismissing his employee with or without cause.' " (p. 1328)

* * *

> "One has no constitutional right to a 'remedy against the lawful conduct of another.'
>
> "As demonstrated above the right, privilege or immunity (plaintiff) alleges he was deprived of is nonexistent." (p. 1329)

Accord: *Freeman* v. *Gould Special School Dist. of Lincoln County, Ark.*, 405 F. 2d 1153 (8th Cir. 1969), cert. denied 396 U. S. 843, 90 S. Ct. 61 (1969). (Note Judge—now Justice—Blackmun participated in this decision.)

These decisions are in accord with the decisions of the United States Supreme Court as announced in *Vitarelli* v. *Seaton*, 359 U. S. 535, 79 S. Ct. 968 (1959); *Nelson* v. *The County of Los Angeles*, 362 U S. 1, 80 S. Ct. 527 (1960). In *Vitarelli* the court remanded for further action an attempted discharge by the Secretary of Interior because in discharging the petitioner, who was an employee at will, the Secretary had violated his own self-imposed restriction. In deciding the case, however, the court made it clear that but for the self-imposed discipline, the Secretary's action would have been approved when it said:

> ". . . The Secretary here . . was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations, he could have discharged the petitioner summarily." (359 U. S. p. 540 and 79 S. Ct. p. 973)

Nelson specifically approved the above language in upholding the summary discharge of a probationary employee. Even the dissenting justices conceded:

> "Doubtless a probationary employee can constitutionally be discharged without specification of reasons at all and this Court has not held that it would offend the Due Process Clause, without more, for a state to put its entire civil service on such a basis, if as a matter of internal policy it could stand to do so. But if a state discharged even a probationary employee because he was a Negro or a Jew, giving that explicit reason, its action could not be squared with the Constitution . . . So here, California could have summarily discharged Globe, and that would have been an end to the matter; without more appearing, its action would be taken to rest on a permissible judgment by his superiors as to his fitness." (362 U. S. p. 16, 80 S. Ct. p. 535)

See also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 81 S. Ct. 1743 (1961).

How does Hodgin's position compare with the foregoing cases, particularly *Parker* and *Jones?* Hodgin was an employee of less than two years, just as Parker and Jones were. Hodgin alleges First Amendment violations as being the real reason for his firing, as did Parker and Jones. Hodgin alleges lack of procedural due process in that he was not informed as to the reasons for his discharge, as did Parker and Jones. It would appear that the

only possible distinction between Hodgin's situation and the factual situations in *Parker* and *Jones* is that Parker and Jones were told that their contract would not be renewed, and they alleged that they had a right of expectancy to the renewal, whereas Hodgin was employed under a contract at the will and pleasure of his superior, and he alleges he had a right to expect it to continue. If this is a distinction, then it is one without a difference, because neither Hodgin, Parker, or Jones had any tenure or legally enforceable right to remain in the job they occupied.

The Court in *Freeman* v. *Gould Special School Dist. of Lincoln County, Ark.*, 405 F. 2d 1153 (8th Cir. 1969), cert. denied, 396 U. S. 843, 90 S. Ct. 61 (1969) did not recognize such a distinction as having legal significance when it said:

> "We agree that the teachers are protected under the Equal Protection Clause from discrimination on account of race or religion or in their assertion of constitutionally protected rights, but no case cited by plaintiffs has gone so far as to say that all actions of any governmental board or agency in employment cases must accord the individual due process under the Fourteenth Amendment so as to provide tenure and a *right to retain the position,* except for cause, and 'for cause' presupposes a right to hearing, notice and appeal. Many government employees are under civil service and some under tenure. Absent these security provisions a public employee has no right to continue public employment, *except insofar as he may not be dismissed or fail to be rehired* for impermissible constitutional reasons, such as race, religion, or the assertion of rights guaranteed by law or the Constitution." (p. 1159, emphasis supplied)

In distinguishing a case that the plaintiffs had cited for the proposition that plaintiffs had to be accorded substantive and procedural due process, the Court commented as follows:

> "On the basis of this holding, plaintiffs then project that the Board must accord due process, both substantive and procedural, in all of its operative procedures. If this were so, we would have little need of tenure or merit laws as they could only be, as argued by the plaintiffs, a discharge for cause with the school board carrying the burden of showing that the discharge was for a permissible reason. We do not believe this to be the law as there are *many public employees who are separated from their employment* by a purely arbitrary decision, upon a change of administration or even a change of factual control where the appointments are not protected by civil service or some type of tenure, statutory or contractual." (p. 1160, emphasis supplied)

In asking the same question that Judge Murrah asked in the *Jones* case: What guaranteed right, privilege, or immunity, which was denied Hodgin, is protected under the Constitution and laws? One must give the same answer that he gave, i.e.: As demonstrated above, the right, privilege, or immunity Hodgin alleges he was deprived of is nonexistent.

If this Court followed the reasoning of the first Circuit Court of Appeals in *Drown* v. *Portsmouth School District,* 435 F. 2d 1182, (1st Cir. 1970), then those charged with the administration of public offices which must hire employees would not be able to engage employees on a probationary or at-will basis. The reasoning in *Drown* envisions that the discharge of an employee be for cause which forecloses the administrator's exercise of

his judgment on many intangibles which may or may not equate to a discharge for cause. Certainly this approach to public employment does not square with the principles laid down by this Court in the cases of *Vitarelli, Nelson,* and *Cafeteria Workers.*

The Plaintiff's argument of the lack of procedural due process destroying substantive constitutional rights does not bear close analysis. In every case where an employee has been discharged for an impermissible reason, there has been a long history of attempted discipline of the employee by the employer or an announced reason that the discharge is for the impermissible reason, *viz.*, *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S. Ct. 1731 (1968). It is the history of the case or the announced reason for the discharge that has the "chilling" effect on fellow employees. It is hard to imagine why an employer charged with the responsibility of hiring and discharging employees would harbor secretly a complaint of some constitutionally protected nature and discharge an employee for this reason. Where a controversial matter arises, there will always be sufficient evidence to show that that was the reason for the discharge, if, in fact, it is the reason.

CONCLUSION

Notwithstanding the urgings of the Plaintiff that the outcome of this lawsuit will shake the employees of the public domain from center to circumference, the law suit is important only to the litigants. It will establish no new precedent. The Plaintiff has had his day in Court and submitted his cause, which was basically factual, to a jury of his peers, and they found against him. The trial judge was eminently correct in his decision on the law,

as demonstrated in the foregoing discussion and, therefore, the Petition for Writ of Certiorari should be denied at the cost of the Plaintiff.

Respectfully submitted,

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and in his official capacity

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CERTIFICATE

I, Jackson L. Kiser, of Young, Kiser & Haskins, 60 West Church Street, Martinsville, Virginia, do hereby certify that on or before the day the Respondent's Brief was filed with the Clerk of the Supreme Court of the United States, I mailed three copies of the said Brief to John C. Lowe and Robert P. Dwoskin, of 1111 West Main Street, Charlottesville, Virginia 22903, counsel of record for the Petitioner.

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